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Nos. 3, 5

In the Supreme Court of the United States

OCTOBER TERM, 1948

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL.,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS E. CHURCH, DECEASED;
EDWARD E. BLACK, EXECUTOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND THIRD CIRCUITS, RESPECTIVELY

SUPPLEMENTAL MEMORANDUM FOR THE COMMISSIONER OF INTERNAL REVENUE

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ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 5

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND THIRD CIRCUITS, RESPECTIVELY

SUPPLEMENTAL MEMORANDUM FOR THE COMMISSIONER OF INTERNAL REVENUE ON REARGUMENT

In our brief on reargument, it was stated that at the time of the adoption of the first federal estate tax statute in 1916 the state courts had uniformly held that a retained interest in the corpus was not essential to the applicability of

the "possession or enjoyment" clause (pp. 6–7). That statement is certainly not open to dispute where the decedent has retained an interest in the income, but the taxpayers in the *Spiegel* case dispute the statement as applied to transfers where no income was reserved, and, in their reply brief on reargument (p. 4), they cite a number of state decisions which are asserted to support their position. We submit that those state cases do not support their position.

In the first place, it will be noted that all of those cases were decided after 1916, the earliest having been decided in 1924 and the latest in 1947. And the only one that is squarely in point on the facts (*Chase* v. *Commissioner*, C. C. H. State Inheritance, Estate and Gift Tax Service (7th ed.) Dec. No. 16,186 (Minn. B. T. A. 1947), has recently been reversed on appeal and the tax sustained. *Chase* v. *Commissioner of Taxation*, 33 N. W. 2d 706 (Minn. 1948).

Many of the cases cited by the taxpayers in the *Spiegel* case are not in point because they present situations where the provisions for distribution of the corpus were not made dependent upon the grantor's death. In *State* v. *Welch's Estate*, 235 Mich. 555, 209 N. W. 930 (1926), for example, the court explicitly pointed out (209 N. W. at p. 934) that the grantor's death made no difference to the beneficiaries and the trust did not end with her death. Other cases cited by the taxpayers that are similarly distinguishable are: *In re Mar-*

shall's Estate, 179 Minn. 233, 228 N. W. 920 (1930); *In re Thompson's Estate,* 147 Ohio State 119, 68 N. E. 2d 71 (1946); *In re Hazelton's Estate,* 148 Ohio State 127, 73 N. E. 2d 799 (1947); *In re Dolan's Estate,* 279 Pa. 582, 124 Atl. 2d 176 (1924); *In re Prange's Will,* 201 Wis. 636, 231 N. W. 271 (1930).

Highfield v. *Equitable Trust Co.,* 34 Del. 509, 155 Atl. 724 (1931), dealt with a peculiar statute which employed the word "belonging", and the court stressed this in making its decision. The court said that under the statute something had to pass at death to support the tax and cited *Reinecke v. Northern Trust Co.,* 278 U. S. 339, as analogous. Certainly the *Highfield* case is no authority for the law as it existed in 1916, and at most reflects the influence of the *Reinecke* case.

Cases such as *People* v. *Northern Trust Co.* 330 Ill. 238, 161 N. E. 525 (1928); *People* v. *McCormick,* 327 Ill. 547, 158 N. E. 861 (1927); *In re Townsend's Estate,* 349 Pa. 162, 36 Atl. 2d 438 (1944); *In re Glosser's Estate,* 355 Pa. 210, 49 Atl. 2d 401 (1946), appear to turn on whether the interests of the beneficiaries were vested (indefeasible) or contingent (defeasible), and hold against the tax where the interests of the beneficiaries were indefeasible at the time of the deed and did not depend upon survivorship. This is particularly apparent from the language appearing in 327 Ill. at pp. 556–557, and 349 Pa. at p. 169. Such cases are different from the *Spiegel*

case, where the interests of the beneficiaries in the corpus were in fact contingent and depended on survivorship.

Moreover, in addition to the various state cases already referred to in our brief on reargument (p. 7, fn. 3; p. 21, fn. 9; p. 35, fn. 17), the following are particularly relevant, since they indicate that trusts of the *Spiegel* type are covered by the "possession or enjoyment" clause; *Matter of Dunlap*, 115 N. Y. Misc. 580 (1921), affirmed, 205 N. Y. App. Div. 128, 130 (1923); *State St. Trust Co.* v. *Treasurer*, 209 Mass. 373, 378 (1911); *Appeal of Seibert*, 110 Pa. 329 (1885); *In re Hollander*, 123 N. J. Eq. 52 (1938).

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ARNOLD RAUM,
L. W. POST
Special Assistants to the Attorney General.

OCTOBER 1948.